

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4196

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

ELMSFORD SHEET METAL WORKS, INC.,

Intervenor,

v.

SHEET METAL WORKS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

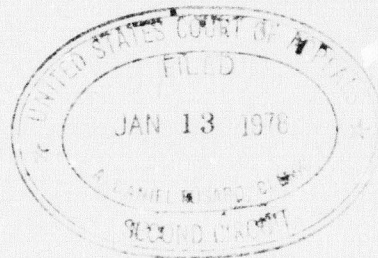
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUES PRESENTED

1. Whether the Board properly found that the Local violated Section 8(b)(3) of the Act by insisting to impasse on the inclusion in the parties' new contract of nonmandatory proposals about interest arbitration and industry promotion funds.
2. Whether the Board properly found that the Local restrained and coerced the Company in the selection of its bargaining representative, thereby violating Section 8(b)(1)(B) of the Act.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board for enforcement of its order issued against Sheet Metal Workers International Association, Local Union No. 38 (hereafter, "the Local") on August 29, 1977, by Members Jenkins, Penello and Walther (Chairman Fanning and Member Murphy dissenting), and reported at 231 NLRB No. 101 (A. 73-94). ^{1/} This Court has jurisdiction over the proceeding under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 et seq.), because the unfair labor practices occurred in or around Peekskill, New York, where Elmsford Sheet Metal Works, Inc. (hereafter, the "Company"), a sheet metal contractor and Intervenor/Charging Party herein, has its principal place of business.

I. The Board's Findings of Fact

The Board found that the Local violated Section 8(b)(3) of the Act by insisting to impasse that the Company agree to inclusion of two non-mandatory subjects of bargaining in their new contract. The Board further found that the Union violated Section 8(b)(1)(B) by restraining the Company in its choice of bargaining representative.

This case was before the Board on a stipulated record, the parties having agreed to waive a hearing before, and decision by, an Administrative Law Judge. The parties also stipulated that no issues were presented which would require oral testimony. (A. 73; 1.)

^{1/} "A." references are to the appendix. References preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

A. Background

From 1952 until 1975,^{2/} the Company was a member of a multi-employer bargaining unit called the Sheet Metal and Roofers Employer's Association of Southeastern New York, Inc. (hereafter, the "Association") (A. 74; 8, 13). On July 1 the Association entered into a collective bargaining agreement with the Union (A. 75; 2, 17-23). This agreement contained, inter alia, a provision requiring the Association's members to contribute to national and local funds for the promotion of the sheet metal industry, and a provision under which deadlocked disputes over new contract proposals could, by the choice of either party, be submitted to the National Joint Adjustment Board (NJAB) for final and binding arbitration (A. 75; 19-20, 22).^{3/} The NJAB consists of representatives from both the local and international union, and from local and national employer associations, in the sheet metal industry (A. 75).

On September 3 the Company resigned from the Association retro-active to June 30. The Company's letter explained that it felt abused by previous NJAB arbitration awards and that the industry promotion funds were not effective in promoting the Company's interest or the interests of the industry. (A. 75; 47-48.) On September 18, however,

^{2/} Unless otherwise indicated, all dates hereafter refer to 1975.

^{3/} Such a procedure is generally referred to as "interest arbitration" in writing on labor relations, to distinguish it from arbitration of grievances arising under an existing contract. See infra, pp 12-13.

the Company signed an individual agreement with the Local, effective June 1, 1975 to June 30, 1976, containing interest arbitration and industry promotion fund provisions identical to those in the Association's June 1 agreement (A. 75; 24-46).

B. Negotiations for a subsequent contract

On March 25, 1976, the Company sent a letter to the Local indicating its desire to negotiate a new contract without the industry promotion fund and interest arbitration provisions (A. 75; 49). The Local responded with counterproposals and also notified the New York State and Federal conciliation services of the status of the negotiations (A. 75; 50-54). At negotiating sessions on May 11, 1976, and June 7, 1976, the Company continued to propose the elimination of the industry promotion fund and interest arbitration provisions; the Local continued to reject these proposals (A. 76; 56-57).

At a third negotiating session on August 30, 1976, the Local asked the Company to agree to the same terms as in the Local's new agreement with the Association (A. 76; 61-62). The Company again urged the elimination of the industry promotion fund and interest arbitration provisions contained in the Local's current agreement (A. 76; 61-62). At the next negotiating session on September 7, 1976, the Company offered to accept the terms of the Association's existing agreement if the industry promotion fund and interest arbitration provisions were eliminated. Thereupon, the Local declared that the parties were deadlocked, and expressed its intention to file for arbitration by the NJAB; it did so on September 10, 1976. (A. 76; 64, 65-66.)

The NJAB held a hearing on November 9, 1976, at which the Company declined to appear. The NJAB subsequently issued a decision on November 11, 1976, which required the Company to agree to the interest arbitration and industry funds provisions. (A. 76; 68-69.)

On November 24, 1976, the Union notified the Company that the Company's refusal to abide by the NJAB decision meant the parties were "no longer in signed agreement" (A. 76; 70). On November 26, 1976, the Union called for a strike to begin on December 1, 1976 (A. 76; 71). Under the threat of the strike, the Company executed an agreement without the disputed provisions, but providing that if the Board ultimately dismissed the Company's charges in this case, those provisions would be restored.

II. The Board's Decision and Order

Based on the foregoing facts, the Board found that the Local violated Section 8(b)(3) of the Act by insisting to impasse on two non-mandatory subjects: the interest arbitration and industry promotion funds provisions (A. 79). The Board also found that the Local coerced and restrained the Company in the selection of its bargaining representative within the meaning of Section 8(b)(1)(B) of the Act. (A. 79.)

The Board's order requires the Local to cease and desist from the unfair labor practices found and from in any like or related manner refusing to bargain with the Company or coercing it in its selection of a bargaining representative. Affirmatively, the order requires the Local to bargain with the Company, and to post and mail appropriate notices of its intent to comply with the order. (A. 80-83.)

ARGUMENT

- I. THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(3) OF THE ACT BY INSISTING TO IMPASSE ON THE INCLUSION OF NON-MANDATORY PROPOSALS ABOUT INTEREST ARBITRATION AND INDUSTRY PROMOTION FUNDS IN THE NEW CONTRACT

A. Introduction

It is well settled that an employer violates Section 8(a)(5) of the Act, and that a union violates Section 8(b)(3), by insisting to the point of impasse upon inclusion of a non-mandatory subject of bargaining in a collective-bargaining agreement. N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-350 (1958); Associated General Contractors of America, Evansville Chapter v. N.L.R.B., 465 F.2d 327, 334-335 (C.A. 7, 1972), cert. denied, 409 U.S. 1108 (1973); Local 164, Brotherhood of Painters (Cheatham Painting Co.) v. N.L.R.B., 293 F.2d 133 (C.A.D.C., 1961), cert. denied, 368 U.S. 824 (1961). International Typographical Union Local 38 (Haverhill Gazette Co.) v. N.L.R.B., 278 F.2d 6, 12 (C.A. 1, 1960),^{4/} aff'd in pertinent part by an equally divided Court, 365 U.S. 705 (1961). If a matter is a mandatory subject, however, either side is privileged to insist on it to the point of impasse and even to invoke economic pressure (e.g., strikes and lockouts) in support of its position. Lodge 76, Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 32, 141,

^{4/} In pertinent part, Section 8(d) defines the duty to bargain collectively as

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment

146-147 (1976); N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477 (1960); N.L.R.B. v. Borg-Warner, *supra*, 356 U.S. at 349. See also American Ship Building Co. v. N.L.R.B. 380 U.S. 300 (1965).

Here, the Board found that the interest arbitration and industry promotion fund provisions insisted on by the Union were non-mandatory subjects of bargaining. In making these determinations, the Board was required to exercise its "special function of applying the general provisions of the Act to the complexities of industrial life." N.L.R.B. v. Erie Resistor Corp., 373 U.S. 211, 236 (1963). The courts of appeals have uniformly sustained the Board's finding in prior cases that similar clauses about interest arbitration and industry promotion funds are non-mandatory subjects.^{5/} We show below that here, in holding the Union's interest arbitration and industry fund proposals to be non-mandatory subjects, the Board has once again "reached a fair and reasoned balance upon a question within its special competence" N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 266-267 (1975).^{6/} It follows that the

^{5/} (1) Interest Arbitration: N.L.R.B. v. Massachusetts Nurses Association, 557 F.2d 894 (C.A. 1, 1977); N.L.R.B. v. The Columbus Printing Pressman & Assistants' Union No. 252, 543 F.2d 1161 (C.A. 5, 1976); N.L.R.B. v. Greensboro Printing Pressmen, 549 F.2d 308 (C.A. 4, 1977).

(2) Industry promotion funds: N.L.R.B. v. Local 264 Laborer's International Union, 529 F.2d 778 (C.A. 8, 1976); N.L.R.B. v. Local Union 2265, Carpenter & Joiners, 317 F.2d 269 (C.A. 6, 1963).

^{6/} See also Local Union No. 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 685-686 (1965); Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 182 (1971) (The "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise").

Board's findings, even if "not required by the Act," are "at least permissible under it" and should therefore be sustained. Ibid.

B. Interest Arbitration Clauses are
Non-mandatory Subjects of Bargaining

1. Interest arbitration clauses do not affect the working conditions of unit employees during the contract term

All three courts of appeals which have considered this issue have held that interest arbitration is not a mandatory subject for bargaining because it "lacks the required direct, significant relationship to wages, hours or terms or conditions of employment." N.L.R.B. v. Massachusetts Nurses Ass., supra, 557 F.2d at 898. Accord: N.L.R.B. v. Columbus Printing Pressmen & Assistants' Union No. 252, supra, 543 F.2d at 1164-1166; N.L.R.B. v. Greensboro Printing Pressmen & Assistants' Union No. 319, supra, 549 F.2d at 309. A major reason for this holding is that interest arbitration "does not pertain to settling terms of wages, hours or other conditions of employment in the contract being negotiated." Columbus Printing Pressmen & Assistants' Union No. 252, 219 NLRB 268, 279 (1975), enf'd 543 F.2d 1161 (emphasis supplied). This feature puts interest arbitration on a plane with the proposal to increase pension payments to retired employees which the Supreme Court considered in Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971). There, the Court noted initially that an employer's bargaining obligation extends only to the "wages, hours and other terms and conditions of employment" of employees in the represented

unit. Id. at 164-167. Since the impact of the proposed change in retirement benefits upon Pittsburgh Plate's active employees was "speculative and insubstantial at best" (id. at 180), the Court ruled that the proposal was not a mandatory topic of bargaining. Similarly, the disputed proposal in the instant case obviously can have no impact whatever upon the unit employees' working conditions during the term of the contract.

"Reading Section 8(d) in such a restrictive fashion serves the important purpose of fostering fruitful negotiations by excluding from the mandatory bargaining sphere proposals [as here] which have only an indirect or remote impact upon the unit employees." Columbus Pressmen, supra, at p. 1166. As Mr. Justice Stewart observed in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 220 (1964) (concurring opinion),

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.

See also Seattle First National Bank v. N.L.R.B., 444 F.2d 30, 33 (C.A. 9, 1971), where the court asserted that "a mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms or conditions of employment."^{7/} By excluding interest arbitration from the

^{7/} Accord: N.L.R.B. v. Local 264, Laborers' International Union (D & C Construction Co.), 529 F.2d 778, 786 (C.A. 8, 1976); N.L.R.B. v. Davison, 318 F.2d 550, 557 (C.A. 4, 1963).

realm of mandatory bargaining subjects, the Board is forestalling compulsory negotiation over a complicated and controversial subject, and one whose adoption can have no significant impact on working conditions in the unit during the term of the contract. In short, an interest arbitration clause "is not a mandatory subject of bargaining since its effect on terms and conditions of employment during the contract period is at best remote." Columbus Printing, supra at p. 1167, quoted with approval in Greensboro Printing, supra, 549 F.2d at 309. See also, Teamsters Local 294 (Conway's Express), 87 NLRB 972, 979 (1949), aff'd on other grounds sub nom. Rabouin v. N.L.R.B., 195 F.2d 906 (C.A. 2, 1952); Covington Furniture Mfg. Corp., 212 NLRB 214, 217 (1974), enf'd, 514 F.2d 995 (C.A. 6, 1975).

2. A holding that interest arbitration is a mandatory subject of collective bargaining would sanction a profound change in negotiations under the Act

a. The present system of voluntary collective bargaining

"The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively." N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 401-402 (1952). Accord: General Electric Co. v. Callahan, 294 F.2d 60, 66 (C.A. 1, 1961). When parties bargain collectively in good faith, their discussions "may narrow

the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take." N.L.R.B. v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960). See also H.K. Porter Co. v. N.L.R.B., 397 U.S. 99, 103 (1970).

Sometimes the parties may reach an impasse on a subject, even though they have bargained in good faith on it. The impasse does not terminate the bargaining process, for the parties remain bound to negotiate in good faith towards an agreement.^{8/} Rather, it ushers in a phase of bargaining wherein "[t]he presence of economic weapons in reserve, and their actual exercise" usually supply the means to break the impasse. N.L.R.B. v. Insurance Agents', *supra*, 361 U.S. at 489.^{9/} The resulting shifts in the parties' positions, and the ultimate settlement, ordinarily reflect the balance of economic power between the parties. Nevertheless, as the Fifth Circuit observed in Columbus Pressmen (543 F.2d at 1169), "this stage of the bargaining process may also contribute significantly to mutual understanding, for the willingness of the parties to inflict and to sustain

^{8/} See Amalgamated Association, etc. v. Wisconsin Employment Relations Board, 340 U.S. 383, 398-399 (1951); Chambers Mfg. Corp., 124 NLRB 721, 725-726 (1959), *enf'd.*, 278 F.2d 715 (C.A. 5, 1960); C. Morris, ed., The Developing Labor Law 331 & n. 386 (1971). Cf. also N.L.R.B. v. Waycross Machine Shop, 283 F.2d 733, 740 (C.A. 5, 1960).

^{9/} Economic force is "a prime motive power for agreements in free collective bargaining." G. Taylor, Government Regulation of Industrial Relations 18 (1948), quoted in Insurance Agents, *supra*. See also N.L.R.B. v. Webb Furniture Corp., 366 F.2d 314, 315 (C.A. 4, 1966); N.L.R.B. v. United States Cold Storage Corp., 203 F.2d 924, 928 (C.A. 5, 1953), *cert. denied*, 346 U.S. 818.

economic pressure may also make 'the real demands of the parties clearer to each other and perhaps to themselves,'" quoting from N.L.R.B. v. Insurance Agents', supra, 361 U.S. at 488 .

- b. Interest arbitration replaces voluntary collective bargaining with a "quasi-legislative" procedure for resolving disputes over new contract terms

Interest arbitration substitutes for the critical, post-impasse phase of collective bargaining a totally different device for obtaining a settlement. The dispute passes from the hands of the parties to the custody of an outsider who must decide the new rules which will govern the parties' relations for the duration of the new contract. The price of the settlement is a reduction in the parties' roles at the most critical stage of negotiation. Instead of acting as bargaining agents, they become mere advocates of their cause before the arbitrator: no longer do they have the opportunity to propose terms, to argue for them, to threaten to use, and use, economic pressure.

Furthermore, the task which the interest arbitrator undertakes is fundamentally different from that undertaken by an arbitrator of grievance disputes. Grievance arbitration is "a vehicle by which meaning and content are given to the collective bargaining agreement" United Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 581 (1960). It is "a part of the continuous collective bargaining process," in that the arbitrator seeks to determine how the parties intended the existing agreement to deal with the subject of their dispute. Ibid. The arbitrator

of a grievance dispute "is confined to interpretation and application of the collective bargaining agreement; he does not dispense his own brand of industrial justice." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). For these reasons, proposals for grievance arbitration have always been recognized as subjects for mandatory bargaining.

In interest arbitration, on the other hand, the arbitrator does virtually "dispense his own brand of industrial justice." Ibid. Thus, as noted, the parties delegate to the arbitrator the final decision on what terms their next contract will contain. However, he ordinarily "lacks contractual or equivalent standards to assist him in resolving such empirical questions, which lie in the mainstream of collective bargaining. . . ."^{10/} Nor will the parties easily remedy this deficiency.

^{10/} W. Feldesman, Another Approach To Strikes: Inducements to Voluntary Arbitration, 33 Geo. Wash. L. Rev. 457, 458 (1964). See also R. Hines, Mandatory Contract Arbitration - Is It a Viable Process?, 25 Ind. & Lab. Rel. Rev. 533 (1972) ("As Sidney and Beatrice Webb so clearly pointed out over 60 years ago, there are no substantive guidelines available to the contract arbitrator upon which the parties can agree in advance.") C. Gregory, The Enforcement of Collective Labor Agreements by Arbitration, 13 U. Chi. L. Rev. 445, 463 (1946), where he observes:

Real arbitration would properly seem to imply the disposition of a dispute in accordance with some standard--possibly a law, a trade practice, or a provision in a contract--which the parties to the dispute concede to exist, although they cannot agree upon what it means or how it is to be applied in the particular case. Collective bargaining over the terms of a collective agreement, on the other hand, is not a process involving the application of a standard of any sort to a specific situation. Collective bargaining is, rather, an attempt to establish standards--the standards of employment which are in themselves the subject of dispute.

It is hardly an exaggeration that "[t]he only conceivable standards that might govern collective bargaining negotiations are general economic standards, and the consensus around the table on these may easily be imagined." Gregory, supra, note 10 at 473.

In sum, the Local's interest arbitration clause here is not merely one more topic for negotiation; rather, its object is a fundamental, structural change in the procedure of voluntary collective bargaining between these parties—"a profound change in negotiations under the Act." Columbus Pressmen, supra, at 1169. As stated by William Feldesman, the Administrative Law Judge whose decision in Mechanical Contractors Association of Newburgh, 202 NLRB 1 (1973), presaged the Board's holding here, this proposed procedure

cuts across the grain of our national labor relations policy for the private sector of our economy, so much so that either party . . . should have the unqualified right to insist upon its elimination as an issue from their negotiations and its removal as a stumbling block in their endeavors to reach an agreement. [Id. at 14-15.]

3. The addition of interest arbitration clauses to more labor contracts may well serve to increase industrial unrest

Voluntary collective bargaining does not guarantee that the parties will be equally satisfied with the result. Ordinarily a party's bargaining success is directly related to the economic force it can muster. At worst, however, a disappointed party must acknowledge that its own weakness at the bargaining table prevented it from getting better terms

and that it freely accepted what the other side offered, having concluded that resort to economic force was, on balance, a less promising alternative. These features of the traditional system of free collective bargaining explain why parties can usually operate peacefully throughout the span of a contract, even though one side may have a strong aversion to the bargain.

By contrast, conditions stemming from interest arbitration have been imposed by an outside party. Furthermore, as shown above, there are in the typical case (as here) no agreed-upon standards to which the arbitrator can refer in fashioning his award. In these circumstances, a disappointed party could readily believe that the arbitrator did not appreciate its real needs or failed to apply appropriate standards (e.g., "fair" wages, "reasonable" work rules). This is particularly true where the disappointed party was opposed to having an interest arbitration clause in the bargaining agreement but was induced to accept it through economic pressure—pressure which would be sanctioned if interest arbitration were held to be a mandatory subject. As the Columbus Pressmen court observed, the result "is that a party's dissatisfaction with the award may be aggravated by doubts about its legitimacy." Supra at p. 1170. Such feelings may well foreshadow strained and stormy relations during the contract term.

Moreover, the likelihood that one party will feel aggrieved by an interest arbitration award increases, we submit, as parties move from contract to contract. Inevitably, the factors which determine the parties'

relative strength for strikes or lockouts change with the passage of time. An arbitrator may not consider this factor and may grant one party's contract demands when the other side is convinced that its bargaining opponent could never have obtained them through voluntary collective bargaining.^{11/} As the Fifth Circuit noted, "this situation runs counter to a basic premise of the Act--that the case of industrial peace is best served when 'the balance of bargaining advantage [is] set by economic realities.'" Columbus Pressmen, supra, at p. 1170, quoting from N.L.R.B. v. Burns Int'l Security Services, Inc., 406 U.S. 272, 288 (1972). "Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." Ibid. Accord: M.R. & R. Trucking Co. v. N.L.R.B., 434 F.2d 689, 695 (C.A. 5, 1970), and cases cited.

In addition, if interest arbitration is held to be a mandatory subject, it is bound to be proposed in many more negotiations than heretofore.^{12/} On the other hand, many employers and unions plainly have

^{11/} See Port Authority of Allegheny County, 50 Lab. Arb. 1103, 1109 (1968) (Platt, Arbitrator), quoted in F. Elkouri & E. Elkouri, How Arbitration Works 55 (3rd ed. 1973); Gregory, supra note 10, at 463; R. Miller, Arbitration Of New Contract Wage Disputes: Some Recent Trends, 20 Ind. & Lab. Rel. Rev. 250, 264 (1967).

^{12/} See Taylor, supra, note 9, at 281 ("A ruling by a government agency requiring management to discuss a particular subject with the Union can strongly influence the relative strengths of the parties that can be brought to bear upon the resolution of the issue itself. A ruling would appear, or could be made to appear, to employees and to the public as government support of the union demand."). See also R. Duvin, The Duty to Bargain: Law in Search of Policy, 64 Col. L. Rev. 248, 272-273 (1964).

deep doubts about the desirability of this procedure.^{13/} Accordingly, a demand for interest arbitration, whether by a union or an employer, may well generate a heated and protracted dispute. And even if there is agreement in principle to have an interest arbitration clause, the formulation of standards for the arbitrator's decision could still provide grounds for a conflict.

Finally, the danger of industrial discord is increased by the fact that an interest arbitration provision can be self-perpetuating: "a party, having once agreed to interest arbitration, may find itself locked into that procedure for as long as the bargaining relationship endures." Columbus Pressmen, *supra*, at p. 1169.^{14/} That party may become so dissatisfied with interest arbitration that it is willing to take a strike or lockout, as the case may be, rather than have the clause

^{13/} The scarcity of such clauses in recent contracts reflects those misgivings. Thus, a 1966 federal study of 1,717 collective bargaining agreements disclosed that fewer than two percent contained such a clause. U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1425-6, Major Bargaining Agreements: Arbitration Procedures 95 (1966). The most comprehensive study of this question concluded that "agreements containing commitments to submit unresolved issues to arbitration in negotiating new contracts have held steady at about 1-2 percent of all major agreements since 1944." J. Stieber, "Voluntary Arbitration of Contract Terms," in Arbitration and Arbitrators, G. Somers & B. Dennis, eds., 71, 115 (1970) [hereinafter "Stieber"].

^{14/} As Professor Stieber has explained (*supra* note, at 94), "once such clauses are negotiated, they are difficult to get rid of." There have been a few cases where an arbitrator has declined to keep the clause in the succeeding contract. See, e.g., Pacific Neo-Gravure, 51 Lab. Arb. 14, 27 (1968) (Platt, Arbitrator); San Joaquin Baking Co., 13 Lab. Arb. 115, 125 (1949) (Haughton, Arbitrator).

in the new contract. However, such a test of strength, with its therapeutic effects, is probably foreclosed. For, if the other side insists on retention and invokes the interest arbitration procedure, an arbitrator will resolve the dispute. The arbitrator may well decide in favor of inclusion—as happened here—for arbitrators "appear to be reluctant to delete the clause once it has been part of the contract for some time." ^{15/} Columbus Pressmen, supra, at p. 1170, n. 11. Indeed, it was on just this basis that the arbitrator in Columbus Pressmen, supra, ordered the parties to retain their interest arbitration clause when the employer there attempted to delete it. See 219 NLRB at 276.

4. In enacting the Act and its principal amendment, Congress rejected the device of compulsory arbitration; sanctioning interest arbitration as a mandatory subject of bargaining would contravene that legislative intent

In the deliberations which preceded enactment of both the Wagner and Taft-Hartley Acts, Congress made clear its aversion to compulsory arbitration—that is, governmentally imposed, binding arbitration to resolve disputes over new contract terms. Thus, Senator Wagner described compulsory arbitration as "so alien to our American traditions of industrial enterprise that it would provoke extreme resentment and constant

^{15/} "[A]rbitrators will leave the parties where they find them unless that party which seeks a change in the previous bargain . . . demonstrates that sufficient changes have occurred which warrant the alteration of the previous bargain." Address by T. Adair, "Arbitration of Interest Disputes in the Local Transit and Newspaper Publishing Industries," in Arbitration of Interest Disputes, Proc. of the 26th Ann. Meet., Nat'l Academy of Arbitrators, B. Dennis & G. Somers eds., 35 (1974).

discord." 74 Cong. Rec. 7573, II Legislative History of the National Labor Relations Act 1935 (hereinafter "Leg. Hist. NLRA"), 2341 (1935).^{16/} Later, Senator Taft, while recognizing the danger posed by strikes in key industries and the inability of collective bargaining always to prevent them, rejected the use of compulsory arbitration under any circumstances, stating that this procedure "would interfere with the whole process of collective bargaining." 93 Cong. Rec. 3951, II Legislative History of the Labor Management Relations Act, 1947 [hereinafter "Leg. Hist. LMRA"], 1008 (1947).^{17/} In Taft's view, if compulsory arbitration were made available, "there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining and it will back out of collective bargaining."^{18/} Ibid.

^{16/} See also N.L.R.B. v. Burns, supra, 406 U.S. at 282 & n. 7; S. Rep. No. 573, 74th Cong., 1st Sess., 12, II Leg. Hist. NLRA at 2312 (1935).

^{17/} When Congress passed the 1974 health care industry amendments, it again rejected compulsory arbitration as a solution to bargaining disputes involving hospitals, even though continuity of patient care is obviously a paramount concern. See Senator Taft's remarks at 120 Cong. Rec. 12945, Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (GPO, 1974 [hereafter "Leg. Hist."], 114. See also Additional Views of Reps. Quie, Steiger, Eshlemen, Ereenborn, H. Rep. No. 93-1051, 93d Cong., 2d Sess., 13-16, Leg. Hist. 280-283 (1974).

^{18/} See also H. Rep. No. 245, 80th Cong., 1st Sess., 101-102, II Leg. Hist. LMRA at 392-393 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 13 I Leg. Hist. LMRA at 419-420 (1947).

A holding that interest arbitration can be imposed on an unwilling party by economic force because it is a mandatory subject would "not technically [be] an example of an orthodox attempt at 'compulsory arbitration.' Yet it comes, in substance, perilously close." Boston Printing Pressman's Union v. Potter Press, supra, 141 F. Supp. 553, 557 (D.C. Mass. 1956), aff'd, 241 F.2d 787 (C.A. 1, 1957), cert. denied 355 U.S. 817. Under these circumstances, each occasion of mandatory contract arbitration virtually "negates the process of collective bargaining, which permits the parties themselves to resolve their disputes or agree upon methods of adjustment." Feldesman, supra, 33 Geo. Wash. L. Rev. at 459. The consequences are predictable (id. at 459-460):

When voluntarism is so subverted, the post-settlement relationship between the parties may deteriorate to the jeopardy of industrial peace. Labor relations, it must be remembered, are ongoing; unlike typical litigants in a lawsuit, the parties do not go their separate ways after judgment, but live with each other after any adjustment. An unhappy "litigant" in a compulsory arbitration proceeding could become the cause of continuing unrest. To prevent labor from striking because it will receive an impartial judgment in response to its demands, to compel labor and management to abide by that judgment though both did not agree to be bound, might possibly compensate for the strike, but at very great cost.

Furthermore, the availability of interest arbitration, like compulsory arbitration, may serve to undermine the parties' practice of true collective bargaining and prevent the striking of a voluntary bargain. For example, if a party anticipates an impasse in some area and expects the dispute to be resolved by interest arbitration, he will be inclined to maintain an extreme position in the hope that the

arbitrator will "split the difference" between the opposing demands.^{19/} In this circumstance, negotiations are short-circuited and real collective bargaining is stultified. In light of these common characteristics of compulsory arbitration and interest arbitration, we submit that Congress could hardly have intended that interest arbitration be mandatory subject, hence one which may be imposed on an unwilling party by economic force. Accord: Columbus, supra, at p. 1171 n. 12.^{20/}

^{19/} See Stieber, supra, note 13, at 115, Stieber adds: "There is evidence that prior agreements to arbitrate have lead parties to rely more on arbitration and less on collective bargaining in writing the terms of new agreements." Ibid. See also H. Davey, Contemporary Collective Bargaining, 309 (1951); Note, Quasi-Legislative Arbitration Agreements, 64 Colum. L. Rev. 109, 113 (1964), and references cited.

^{20/} It should be noted that the foregoing criticism has little, if any, application to ad hoc interest arbitration--that is, when the parties spontaneously agree to arbitrate after negotiations become deadlocked. Where there is no prior contractual commitment to interest arbitration, the parties know that an issue will not be settled by an arbitrator unless both sides agree to submit it. Hence, they will have little incentive to stake out an extreme position to protect themselves against that eventuality. Equally important--in view of the disruptive potential of contractual interest arbitration just discussed--when parties agree to let an arbitrator settle their new contract dispute, it is because both have decided that they have less to gain from either further negotiation or economic force. The mutual choice of arbitration under these conditions minimizes the likelihood of dissatisfaction with the award. For these reasons, commentators believe that interest arbitration is much more conducive to effective voluntary collective bargaining if it is ad hoc, rather than required by contract. See, e.g., Davey, supra note 20, at 311, 312; Stieber, supra note 14, at 116; Note; Quasi-Legislative Arbitration Agreements, 64 Colum. L. Rev. 109, 125 (1964).

5. The fact that interest arbitration clauses, where agreed to, are lawful and to some extent enforceable, does not militate against the Board's conclusion that the subject is non-mandatory

Contrary to the Local, the presence of an admittedly lawful interest arbitration clause in the parties' 1975-1976 agreement does not preclude the Board's finding that the Local, by insisting on its retention, violated its bargaining obligation under the Act. The Supreme Court has made clear that "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." Allied Chemical Workers v. Pittsburgh Plate Glass, *supra*, 404 U.S. at 187. See also N.L.R.B. v. Borg-Warner, *supra*, 356 U.S. at 349; N.L.R.B. v. Davison, *supra*, 318 F.2d at 557.

Nor is it material to the issue here that the Local would have been entitled to invoke the interest arbitration procedure built into the 1975-1976 agreement in the event of a dispute over a mandatory subject of bargaining, and, perhaps, to compel the Company to submit to binding arbitration of this dispute.^{21/} However, the presence of such a procedure does not give a party a special right to insist on the adoption--or the

^{21/} The following cases indicate that interest arbitration clauses are enforceable in the federal courts where the deadlocked proposals relate to mandatory bargaining subjects: Builders Association v. Greater Kansas City Laborers District Council, 326 F.2d 867 (C.A. 8, 1964); Winston-Salem Printing Pressmen and Assistants' Union v. Piedmont Publishing Co., 393 F.2d 221 (C.A. 4, 1968); Division No. 892, Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. M.K. & O. Transit Lines, Inc., 210 F. Supp. 351, 354 (N.D. Okl., 1962), *rev'd* in other grounds, 319 F.2d 488 (C.A. 10, 1963), *cert. denied* 375 U.S. 944. As the Fifth Circuit pointed out in Columbus Pressmen (543 F.2d at 1168), the court cases which refuse to enforce an interest arbitration clause under any circumstances all antedate the Supreme Court's decision in Lincoln Mills and the "Steelworkers Trilogy" about the enforceability of grievance arbitration agreements.

retention—of any provision in the new contract which is merely a permissive subject of bargaining. And, if a party's insistence on such a provision has violated the Act, then its subsequent resort to the interest arbitration procedure will simply compound that breach. See, e.g., Sperry Systems Management Div., Sperry Rand Corp. v. N.L.R.B., 492 F.2d 63, 67-69 (C.A. 2, 1974) cert. denied, 419 U.S. 831; Smith Steel Workers v. A. O. Smith Corp., 420 F.2d 1 (C.A. 7, 1969). In particular, if interest arbitration is not a mandatory subject, as the Board has found, it follows that a party's insistence on retaining such a clause, as well as its invocation of an existing interest arbitration clause to that end, equally violate Section 8(b)(3) of the Act.

6. Summary

As we have shown, the Local's disputed proposal envisages a radical departure from traditional voluntary collective bargaining: "what the [Local] proposed in this case was that collective bargaining be abandoned at a vital point, and that the [Company] totally yield its statutory right to bargain . . . committing itself not to [use economic pressure] at any time starting with the initiation of bargaining negotiations for a new contract, in favor of adjustment by a third party, . . ." Mechanical Contractors Assn, supra, 202 NLRB at 14. As a permissive subject, interest arbitration may, of course, be incorporated into the parties' bargaining procedures by their own, mutual, free choice. Even so, because interest arbitration is so fraught with problems, the immediate benefit of a settlement without a strike or lockout may well be outweighed by the long-term dissatisfaction of the losing side. Mandatory status

for interest arbitration, on the other hand, makes possible its imposition upon an unwilling party, and such a circumstance substantially increases the probability of strong dissatisfaction about working conditions which have been dictated by an arbitrator. Hence, instead of promoting peaceful relations between the parties, interest arbitration may in the long run drive them apart.

In light of these considerations—as well as the others discussed above—the Board could reasonably conclude that "[e]ach party should be afforded the utmost liberty to decide of its own volition whether to eschew collective bargaining and its statutorily guaranteed right to participate in that process, and to accept instead quasi-legislative arbitration united with a ban on economic action." *Id.* at 14-15. Its consistent holding that interest arbitration is not a mandatory proposal promotes the basic policies of the Act and should therefore be sustained.

C. Industry Promotion Funds do not Relate
to a Mandatory Subject of Bargaining

The object of the industry promotion fund provision which the Local insisted on was ". . . to promote programs of industry education, training, negotiation and administration of collective bargaining agreements, research and promotion, such programs serving to expand the market for the services of the sheet metal industry, improve the technical and business skills of employers, stabilize and improve Employer-Union relations, and promote, support, and improve the employment opportunities for employees" (A. 19, 26). The Board

has consistently held that "the question of participation in an industry promotion fund is not a mandatory subject of bargaining because it is neither wages, hours nor a term or condition of employment" Detroit Resilient Floor Decorators Local Union No. 2265 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 136 NLRB 769, 772 (1962), enforced, 317 F.2d 269 (C.A. 6, 1963). Accord, N.L.R.B. v. Local 264 Laborers' International Union, 529 F.2d 778, 786 (C.A. 8, 1976). See also Local 80, Sheet Metal Workers, et al., 161 NLRB 229, 233 (1966), and cases cited at n. 6; Southern California Pipe Trades District Council No. 16, 167 NLRB 1004, 1008 (1967); Plumbers & Pipefitters Local Union No. 280, 184 NLRB 398, 400, 403 (1970).

This conclusion is required, in the Board's view, by the Supreme Court's decision in N.L.R.B. v. Wooster Div. of Borg-Warner Corp., *supra*. There the Supreme Court held nonmandatory the employer's proposal that the union agree to take a secret ballot among the unit employees before calling a strike. The Court found that this proposal was not encompassed within the statutory phrase "wages, hours and other terms and conditions of employment" because it "settled no term of condition of employment . . ." 356 U.S. at 350. Furthermore, rather than "regulat[ing] the relations between the employer and the employees", the Court observed, "the Company's ballot proposal deals only with the relations between the employees and their union" (emphasis added).

As the Board pointed out in Detroit Resilient, supra, industry promotion funds are clearly outside the scope of mandatory bargaining subjects under the Supreme Court's guidelines in Borg-Warner. Essentially like the "ballot provision" in Borg-Warner, such a proposal does not pertain to the employer's relationship vis-a-vis its employees. It concerns itself rather with the relationship of employers to one another, or, like advertising, with the relationship of an employer to the consuming public.

It does not avail the Local to urge that such promotion funds may contribute to a more prosperous industry, and ultimately redound to the benefit of the employees. The Board has always recognized this possibility, and has held that parties "are free to include provision of this type in collective bargaining agreements" as a voluntary matter. Detroit Resilient, supra, 136 NLRB at 772. The Board has also recognized, however, that the bargaining process may be fatally encumbered if the scope of mandatory bargaining is enlarged to include any subject simply because it is relevant to a given industry's health. In the Board's words, "[t]o hold . . . that one party must bargain at the behest of another on any matter which might concurrently enhance the prospects of the industry would transform bargaining over compensation, hours and employment conditions of employees into a debate over policy objectives." Id. at 771, quoted with approval in N.L.R.B. v. Detroit Resilient, supra, 317 F.2d at 270.

D. The Union Insisted to Impasse on Inclusion
of the Interest Arbitration and Industry
Promotion Funds provisions

Impasse is defined as the point in negotiations where "no realistic possibility [existed] that continuation of discussion at that time would have been [achieved] 1." American Federation of Television and Radio Artists (Taft Broadcasting) v. N.L.R.B., 395 F.2d 622, 628 (C.A.D.C., 1968) quoted with approval, N.L.R.B. v. Beck Engraving Co., Inc., 522 F.2d 475, 484 n. 16 (C.A. 3, 1975). In other words, impasse is "synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973) enf. denied on other grounds, 500 F.2d 181 (C.A. 5, 1974).

Moreover, it is important to note that a Board finding of a bargaining impasse is entitled to deference, for "in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of the bargaining processes or better suited to the experience of a board which deals constantly with such problems." Dallas General Drivers, etc. v. N.L.R.B., 355 F.2d 842, 844-845 (C.A.D.C., 1966). Accord: American Federation of Television & Radio Artists (Taft Broadcasting Co.) v. N.L.R.B., *supra*, 395 F.2d at 627; N.L.R.B. v. J.H. Bonck Co., 424 F.2d 634 (C.A. 5, 1970). See also, N.L.R.B. v. Webb Furniture Corp., *supra*, 366 F.2d at 315.

Abundant evidence supports the Board's finding that negotiations were at impasse when the Local invoked the existing interest arbitration agreement. Throughout the negotiations the Company had consistently indicated its desire to exclude the interest arbitration and industry promotion fund provisions from the new contract. The Local was equally strong in its insistence on retaining them. Neither side gave any indication of yielding. Finally, at the September 7, 1976, negotiating session the Local expressly declared that the negotiations were at a deadlock. Three days later, the Local invoked the interest arbitration provision of the old contract to obtain a resolution of these two issues. Significantly, the interest arbitration clause expressly made resort to that procedure conditional upon a "deadlock" over a proposed new contract term.

Before the Board, the Local argued, in effect, that before the negotiations could reach an impasse, the Local invoked a procedure--interest arbitration--which the parties had provided to forestall that result. This argument confuses the threshold and essentially factual question of whether a deadlock exists over some demand, with a different, and essentially legal, issue: whether this deadlock, in light of the subject of the demand, may lawfully be resolved by invoking the parties' existing contractual arrangement for interest arbitration.

As we have just shown, there is abundant evidence to support the Board's factual finding that the Union insisted to deadlock over its demands to retain the disputed interest arbitration and industry promotion fund provisions.

Resolution of the second issue turns, however, on whether the Local's demands pertained to mandatory or to non-mandatory subjects of bargaining. In the first case, the Local was entitled to invoke the existing interest arbitration agreement, just as it could properly resort to any type of economic pressure not prohibited by the contract or the Act. See Columbus Pressmen, supra, 543 F.2d at 1166, 1169.

Here, however, the provisions sought by the Local were not mandatory, and the Local's insistence on them was enough to violate its statutory bargaining duty. Any subsequent use of additional pressure to get its way—whether by resort to economic force or interest arbitration—would simply compound its misconduct. See discussion and cases cited supra at pp. 6-7, 27. It follows, as the Board correctly noted, that the Local's "further insistence that the non-mandatory subjects be arbitrated [was], in effect, a continuation of the same violative conduct" (A. 80).

II. THE BOARD PROPERLY FOUND THAT THE LOCAL
COERCED AND RESTRAINED THE COMPANY IN ITS
SELECTION OF BARGAINING REPRESENTATIVE,
THEREBY VIOLATING SECTION 8(b)(1) (B) OF
THE ACT

Section 8(b)(1)(B) provides that "it shall be an unfair labor practice for a labor organization. . . to restrain or coerce. . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The statutory language and the legislative history make it clear that Section 8(b)(1)(B) bars "union attempts to dictate to employers who would represent them in collective

bargaining and grievance adjustment." Florida Power & Light Co. v. I.B.E.W. Local 641, 417 U.S. 790, 803 (1974). The Senate Report explained the basic import of the provisions as follows:

A union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

S. Rep. No. 105, 80th Cong., 1st Sess., 21; 1 Legislative History of the Labor Management Relations Act, 427 (1947).

Here, the interest arbitration clause which the Local demanded provided for arbitration, not by an impartial referee, but by a body (the NJAB) which included no members who could realistically be expected to represent the Company's interests. Indeed, since the Company had abandoned the Association, and was pushing for different contract terms than the Association had agreed to, the Association members of the NAJB who were the Company's ostensive representatives obviously had interests in conflict with the Company's. In these circumstances, the Local's adamant insistence on retaining the old interest arbitration clause, and its resort to that procedure in order to get its way, went beyond a mere violation of its general bargaining duty. This conduct also restrained the Company from a free choice of bargaining representative within the prohibition of Section 8(b)(1)(B) by forcing the Company to forego the use of its own

bargaining representative in future negotiations. See, Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, 183 NLRB 1330 (1970), enforced, 459 F. 2d 694 (C.A. 9, 1972); International Ladies' Garment Workers' Union, 122 NLRB 1390 (1959), enf. denied, 274 F.2d 376 (C.A. 3, 1960).^{22/}

Before the Board, the Local maintained that its conduct did not amount to "restraint" or "coercion" within the meaning of Section 8(b)(1)(B). This

^{22/} Accord, N.L.R.B. v. Local 264, Laborers' International Union, 529 F. 2d 778, 787 (C.A. 8, 1976); Associate General Contractors of America, Evansville Chapter, Inc. v. N.L.R.B., 465 F. 2d 327, 331 (C.A. 7, 1972); Local 964, United Brotherhood of Carpenters and Joiners, 181 NLRB 948 (1970), enforced, 447 F. 2d 643 (C.A. 2, 1971); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, 184 NLRB 398 (1970); United State, Tile & Composition Roofers, & Waterproof Workers Association, Local No. 36, 172 NLRB 2248 (1968); Southern California Pipe Trades District Council No. 16, 167 NLRB 1004 (1967), enforced, 449 F. 2d 668 (C.A. 9, 1971); Painters District Council No. 36, 155 NLRB 1013 (1965); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 525, 135 NLRB 462 (1962). Although it found a prima facie Section 8(b)(1)(B) violation in International Ladies' Garment Workers' Union, supra, the Third Circuit denied enforcement because it found that the record evidence, including the employer's statement that it had "put one over on the Union," demonstrated that the employer's appointment of the former union official as its bargaining representative amounted to a bad faith offer to bargain. 247 F. 2d at 379. Thus, the court carved out a narrow exception, not applicable here, to the general rule that "each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty of the opposite party to negotiate with the appointed agent." 274 F. 2d at 378.

overlooks the obvious intent of Congress that the sanction of this section be triggered by a modest amount of pressure.^{23/} Thus, the fact that Section 9(f)(1) of the House Bill, H.R. 3020, not enacted, would have prohibited multi-employer bargaining altogether, see H.R. Rep. No. 245, 80th Cong., 1st Sess. 8-9, 56 (1947), suggests that Congress was deeply concerned about the potential for coercion in this area even though it passed the more limited proposal contained in Section 8(b)(1)(B). Florida Power, supra, 414 U.S. at 803. Moreover, the Supreme Court has determined that Section 8(b)(1)(B) proscribes indirect union pressure against supervisor-members, in addition to direct economic pressure aimed at the employer, since it may adversely affect their performance as management representatives. Id. at 804-805.

In essence, the tactics employed by the Local inexorably forced the Company, if it were to accept the NJAB dispute procedure, either to embrace the national employer's associations on the NJAB as its representative or submit to de facto nonrepresentation on the NJAB. Since "[t]he specific concern of Congress" in enacting Section 8(b)(1)(B) "was to prevent unions from trying to

^{23/} As Senator Taft, cosponsor of the legislation, explained.

"Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No. I will not join in national bargaining. Here is my representative, and this is the man you deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purpose." 93 Cong. Rec. 3837, II Legislative History of the Labor-Management Relations Act 1012 (1947).

force employers into or out of multi-employer bargaining units," Florida Power & Light Co. v. I.B.E.W. Local 641, supra, 417 U.S. at 803, the Board properly concluded that the Local's tactics were designed to force the Company to accept representation by the NJAB, in violation of Section 8(b)(1)(B).

In any event, the Local was not content to rest after invoking the interest arbitration procedure and obtaining the desired award. Instead, it threatened the Company with a work stoppage if the Company failed to yield on the disputed clauses and thereby extracted from the Company the concession that these clauses would be included in the new contract if the Board eventually decided the instant proceeding in the Local's favor. The Local's strike threat unquestionably constitutes sufficient coercion to bring its conduct within the prohibition of Section 8(b)(1)(B). See, for example, N.L.R.B. v. Local 294, Teamsters, 284 F. 2d 893, 896 (C.A. 2, 1960); International Typographical Union (American Newspaper Publishers Assn.), 85 NLRB 951, 958 (1949), enfd., 193 F. 2d 782, 805 (C.A. 7, 1951) Cert. denied 344 U.S. 812

CONCLUSION

For the foregoing reasons, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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January 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
and	)	No. 77-4196
	)	
ELMSFORD SHEET METAL WORKS, INC.,	)	
	)	
Intervenor,	)	
	)	
v.	)	
	)	
SHEET METAL WORKERS INTERNATIONAL	)	
ASSOCIATION, LOCAL UNION NO. 38,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief and two (2) copies of the appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 10th day of January, 1978.